No. ____

92-412

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Supreme Court, U.S.
FILED
1992
OFFICE OF THE CLERK

MITSUBISHI HEAVY INDUSTRIES, LTD., individually and on behalf of MITSUBISHI AIRCRAFT INTERNATIONAL, INC., a dissolved corporation,

Petitioner,

—v.—

WILLIAMS AVIATION COMPANY, *et al.* (and CONSOLIDATED CASES),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE 193RD JUDICIAL DISTRICT COURT, DALLAS COUNTY, TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a corporation was denied due process and the right to counsel under the Fifth and Fourteenth Amendments of the Constitution of the United States when a Texas state court, in violation of the attorney-client privilege, ordered the corporation to disclose confidential oral and written communications between the corporation and its attorney and former general counsel.

PARTIES TO THE PROCEEDING BELOW

The parties before the Court and to the proceeding below are:

1. Claudia T. Smith, Individually and as Heir and Legal Representative of the Estate of Robert R. Smith, Deceased
2. Linda A. Mardis, Individually and as Independent Executrix of the Estate of Kenneth B. Mardis
3. Shannon Mardis Campbell
4. Tara Mardis
5. Rebecca S. Malaise, Individually and as Independent Co-Executrix of the Estate of Robert R. Smith, Deceased
6. James B. Shepherd, Jr., Independent Co-Executor of the Estate of Robert R. Smith, Deceased
7. Kathy S. Parker
8. Joseph P. Smith
9. Joe B. Smith
10. Ima Lee Smith
11. Betty Marie Giebel, Individually and as Independent Executrix of the Estate of Aaron F. Giebel, Deceased
12. Mark Giebel
13. Kathy Giebel Colby
14. Suzanne Giebel Taylor
15. Jill Giebel
16. Carol Carpenter Winkel, Individually and as Independent Executrix of the Estate of James W. Winkel

17. Suzanne Legendre Kidwell, Individually and as Independent Executrix of the Estate of Randy Mal Kidwell, Deceased
18. Kara Suzanne Kidwell
19. Stephanie Lynn Kidwell
20. Orval Mal Kidwell
21. Eva Martin Kidwell
22. Aircraft Maintenance, Inc.
23. Williams Aviation Company
24. Clayton W. Williams, Jr.
25. Neal Raley
26. Travelers Insurance Company
27. Performance Insurance Company
28. The Honorable Michael J. O'Neill, Judge, 193rd Judicial District Court, Dallas County, Texas
29. Mitsubishi Heavy Industries, Ltd.*
30. Mitsubishi Aircraft International, Inc.**
31. Lorene Deville
32. Frank Mardis
33. Kimberly A. McKandles

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* Rule 29.1 Statement: Mitsubishi Heavy Industries, Ltd. has no parent company. Its subsidiaries (except wholly owned subsidiaries) in the United States are: Mitsubishi Engine North America, Inc.; MHI Forklift America, Inc.; and, MLP U.S.A., Inc.

** Mitsubishi Aircraft International, Inc. was dissolved pursuant to the Texas Business Corporation Act on August 25, 1987.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING BELOW ii

TABLE OF AUTHORITIES..... v

OPINIONS BELOW 2

JURISDICTION..... 2

STATUTORY PROVISION INVOLVED..... 2

STATEMENT OF THE CASE..... 2

REASONS FOR GRANTING THE WRIT 9

I. ARBITRARY DETERMINATIONS BY A COURT WHICH IGNORE THE ATTORNEY-CLIENT PRIVILEGE VIOLATE DUE PROCESS AND THE RIGHT TO COUNSEL .. 10

II. A GENUINE CONFLICT THAT THE COURT SHOULD RESOLVE EXISTS AMONG THE STATES WHERE THE ATTORNEY-CLIENT PRIVILEGE IS APPLIED TO FORMER CORPORATE COUNSEL 14

CONCLUSION..... 18

TABLE OF AUTHORITIES

Cases: PAGE

American Motors Corp. v. Huffstutler, 61 Ohio St. 3d 343, 575 N.E.2d 116 (Ohio 1991) 15, 16

Chase Manhattan Bank v. Turner & Newall, PLC, 964 F.2d 159 (2d Cir. 1992) 13

Fisher v. United States, 425 U.S. 391 (1976) 11

Hunt v. Blackburn, 128 U.S. 464 (1888) 11

Maness v. Meyers, 419 U.S. 449 (1975) 11, 13

Mortgageamerica Corp. v. Am. Nat'l Bank of Austin, 651 S.W. 2d 851 (Tex. App.—Austin 1983, writ ref'd n.r.e.)..... 17

National Sur. Corp. v. Dominguez, 715 S.W.2d 67 (Tex. App.—Corpus Christi 1986, no writ) 17

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. ____, 120 L.Ed.2d 674 (1992)..... 14

Poe v. Ullman, 367 U.S. 497 (1961) 14

Powell v. Alabama, 287 U.S. 45 (1932)..... 11

Trammel v. United States, 445 U.S. 40 (1980) 11

United States v. Zolin, 491 U.S. 554 (1989)..... 12

Upjohn Company v. United States, 449 U.S. 383 (1981) 10, 11, 12

West v. Solito, 563 S.W.2d 240 (Tex. 1978) 17

PAGE

Statutes, Rules & Treaties:

U.S. Const. amend. XIV, § 1 2

28 U.S.C. § 1257(a) 2

TEX. R. EVID. 503(b) (West 1991) 16

OHIO R. EVID. 501 16

OHIO REV. Code Ann. § 2317.02(A) 16

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Petitioner,

—v.—

WILLIAMS AVIATION COMPANY, et al. (and CONSOLIDATED CASES),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE 193RD JUDICIAL DISTRICT COURT, DALLAS COUNTY, TEXAS

PETITION FOR WRIT OF CERTIORARI

Petitioner MITSUBISHI HEAVY INDUSTRIES, LTD. ("MHI"), individually and on behalf of MITSUBISHI AIRCRAFT INTERNATIONAL, INC. ("MAI"), a dissolved corporation, respectfully prays that a writ of certiorari issue to review the order of the Honorable Michael J. O'Neill, Judge, 193rd Judicial District Court, Dallas County, Texas, entered in the action below on March 18, 1992, which ordered the disclosure of confidential communications between petitioner and its attorney and former general counsel.

OPINIONS BELOW

The unreported order of the Texas Supreme Court denying petitioner leave to file a writ of mandamus, entered on May 27, 1992, is reprinted in the Appendix hereto at 1a, *infra*.

The unreported order of the Honorable Michael J. O'Neill, Judge, 193rd Judicial District Court, Dallas County, Texas, entered on March 18, 1992, which gave rise to the petition for writ of mandamus, is reprinted in the Appendix hereto at 3a, *infra*.

JURISDICTION

The order of the Texas Supreme Court denying petitioner leave to file a writ of mandamus was entered on May 27, 1992 and the order of the Texas Supreme Court denying petitioner's motion for a rehearing was entered on July 1, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Constitution of the United States, Amendment XIV:

> Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

The order below that forms the basis of this petition stems from state and federal court litigation in Texas arising out of the February 14, 1990 crash of a Mitsubishi MU-2B-60 twin engine corporate aircraft near Putnam, Texas. The accident resulted in the deaths of the five occupants and the destruction

of the aircraft. In August 1990, six wrongful death actions were commenced in Dallas County, Texas state court.[1] MHI and MAI were named as the "manufacturing" defendants in each of these cases. Additional defendants were: 1) Williams Aviation Company ("Williams Aviation"), the corporate owner and operator of the aircraft; 2) Clayton W. Williams, Jr., the pilot's employer; and, 3) Aircraft Maintenance, Inc., an aircraft repair facility.

The aircraft was designed, and major components of its fuselage were manufactured, in Japan by MHI, a Japanese corporation. Final assembly and sale of the aircraft in 1980 were performed in Texas by MAI, which had been a Texas corporation and a wholly owned subsidiary of MHI. MAI was formally dissolved pursuant to the Business Corporation Act of Texas on August 25, 1987.

Approximately one year after the filing of the wrongful death actions in state court, Williams Aviation commenced an action against MHI and MAI, seeking damages for the loss of the aircraft. The property damage action was originally commenced in state court in Midland, Texas and was removed by MHI on diversity grounds to the United States District Court for the Western District of Texas. The action proceeded to trial in March, 1992 and on April 7, 1992, the jury found petitioner 68% liable and third-party defendant Clayton W. Williams, Jr. 32% liable for the pilot's negligence.[2] MHI's appeal is pending in the United States Court of Appeals for the Fifth Circuit.

On or about May 21, 1991, a deposition subpoena was served in the state action upon Raymond S. Vinton, Esq., an attorney and former general counsel for MAI. Mr. Vinton is a Dallas based lawyer who, between 1981 and 1987, served as MAI's attorney and general counsel. After 1987, during the post-dis-

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1 The six wrongful death actions were consolidated for all purposes on February 20, 1992. These consolidated actions have not yet proceeded to trial and are presently pending before the Honorable Michael J. O'Neill in the 193rd Judicial District Court, Dallas County, Texas.

2 Prior to trial, MAI was dismissed on the basis of its 1987 corporate dissolution.

solution phase of MAI's existence, Mr. Vinton ceased to be an employee of MAI. However, he continued to act as MAI's attorney, pursuant to contract, until his services in that capacity were terminated on December 31, 1989.

As general counsel for MAI, Mr. Vinton's primary duties were to provide legal advice and to perform legal analyses. Mr. Vinton has no technical or personal knowledge about the engineering, design and testing aspects of the aircraft. However, in his capacity as an attorney, Mr. Vinton regularly met with members of MAI's and MHI's product integrity and product liability defense teams, in the course of which he was provided with confidential information regarding aircraft design, testing and flight characteristics, the complex certification requirements of the Federal Aviation Regulations as well as investigation reports and technical information regarding accidents and defense strategies in pending product liability litigation involving this type of aircraft. Mr. Vinton assisted MAI's and MHI's litigation counsel in retaining expert witnesses, met with such experts and helped to prepare and develop defense strategies. As general counsel, Mr. Vinton directly controlled the litigation of commercial matters for MAI, many of which involved product liability claims. As to those claims, Mr. Vinton had complete access to company technical information as well as MAI's and MHI's aircraft certification and product liability files.

Notwithstanding the highly confidential nature of Mr. Vinton's lengthy attorney-client relationship with MAI, the subpoena that was served upon him sought his deposition testimony and disclosure on a wide range of his oral and written communications with the corporation, including attorney-client correspondence. MHI, individually and as sole shareholder of the dissolved corporation MAI, moved in the state court to quash the subpoena and sought a protective order on the ground that the production of documents and deposition of MAI's attorney and former general counsel would violate the attorney-client privilege, since it would necessarily involve disclosure of confidential information obtained by the witness

solely because of his employment as general counsel for MAI. Since Mr. Vinton has no personal technical knowledge or expertise, the only purpose for the deposition would be to invade the attorney-client relationship between Mr. Vinton and petitioner.

On June 28, 1991, the Honorable Mark Whittington, a Texas state court judge presiding over one of the wrongful death actions, ordered the deposition of Mr. Vinton to proceed, stating that any objection to individual questions put to the witness would be heard by the court after the deposition. On October 31, 1991, in accordance with Judge Whittington's ruling, Mr. Vinton's deposition proceeded, with notice to all of the parties in both the state court and the federal court actions. At the deposition, Mr. Vinton's testimony confirmed his lack of technical background or knowledge. However, he was asked numerous questions by adverse counsel about oral and written communications he had had with various present and former officers and employees of MHI and MAI. Counsel for MHI interposed objections to a number of these questions on the ground of attorney-client privilege. As to the questions objected to by MHI on the basis of this privilege, Mr. Vinton declined to respond upon the advice of separate counsel he had retained to represent him at the deposition.

The confidential correspondence at issue consists of several exchanges of letters between Mr. Vinton and MHI, MAI and their outside litigation counsel, Marshall S. Turner, Esq. during the period from February 15, 1990 (the day after the accident) to May 24, 1990. The conversations in question took place between Mr. Vinton and several former officers and employees of MAI, as well as Mr. Turner, shortly after the accident. At his deposition, Mr. Vinton testified that the correspondence covered prior events as well as recent events and that he could not separate out the confidential information he received in his former capacity as an attorney for MAI.

After Mr. Vinton's deposition, Williams Aviation and Clayton W. Williams, Jr. moved in the state court to overrule the objections made by MHI at the deposition regarding certain

conversations that had taken place between Mr. Vinton and various persons employed by MAI. These defendants also moved to compel production of certain letters between Mr. Vinton and MHI, MAI and their outside litigation counsel. At the same time, a similar motion for relief was made by Williams Aviation as plaintiff in the federal court action.

Prior to a determination of the motion in the state court, a hearing on the federal court motion was conducted before United States Magistrate Judge Robert R. Sykes, on January 23, 1992. Magistrate Sykes conducted an *in camera* review of this correspondence. In an opinion and order dated January 24, 1992, Magistrate Sykes ordered several of the letters to be produced, finding that the letters were not protected by the attorney-client privilege. The unreported opinion and order of Magistrate Sykes entered on January 24, 1992 is reprinted in the Appendix hereto at 7a, *infra*. Magistrate Sykes also held that the remainder of Mr. Vinton's correspondence was confidential and protected by the privilege. Moreover, Magistrate Sykes held that all of the conversations in issue were privileged. Magistrate Sykes' order was affirmed by the Honorable Lucius D. Bunton, Chief Judge of the United States District Court for the Western District of Texas, by order dated March 19, 1992, a copy of which is reprinted in the Appendix hereto at 13a, *infra*.

On March 18, 1992, Williams Aviation's motion to overrule the same objections was decided in the state court actions by the Honorable Michael J. O'Neill of the 193rd Judicial District Court of Dallas County, Texas. Notwithstanding Magistrate Sykes' prior consideration and decision on essentially the same motion, Judge O'Neill ordered, without opinion, the production of all of Mr. Vinton's correspondence in the state court actions. Further disregarding Magistrate Sykes' prior decision, Judge O'Neill also ordered, without opinion, disclosure of the substance of all Mr. Vinton's conversations with former MAI officers, employees and outside counsel. *See* Appendix at 5a.

Although Mr. Vinton's services as an attorney for MAI had been terminated on December 31, 1989 (prior to the writing of

these letters or the occurrence of the conversations), much of the information contained in the correspondence and conversations was obtained by Mr. Vinton in the course of the confidential attorney-client relationship that he had with MAI.

Magistrate Sykes ruled in favor of MHI in the federal court action on the question of privilege regarding all of the conversations as well as much of the correspondence. He permitted disclosure of several letters on grounds that, in his view, they had not been written for the purpose of seeking legal advice or facilitating rendition of legal services and/or they did not contain privileged information.

Although petitioner disagrees with that portion of Magistrate Sykes' order requiring disclosure of certain letters,[3] such letters are instructive as they illustrate the sensitive and confidential nature of the subject matter and content of all of Mr. Vinton's correspondence. Two of the letters, a May 7, 1990 letter to Mr. Vinton from Mr. Sam Nakagawa, President of MAI and a May 16, 1990 letter from Mr. Vinton to Mr. Nakagawa, are reprinted in the Appendix hereto at 15a and 17a, *infra*. Judge O'Neill's order of March 18, 1992 required disclosure of not only these two letters, but also the correspondence found by Magistrate Sykes in the federal court to be protected from disclosure by the attorney-client privilege. Judge O'Neill also ordered disclosure of the content of Mr. Vinton's conversations, all of which Magistrate Sykes had ruled were protected from disclosure by the attorney-client privilege.

The materials that were protected by Magistrate Sykes' order, but that were ordered disclosed without protection by Judge O'Neill's subsequent order, are privileged under any standard of the attorney-client privilege.

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3 The letters were required to be produced in the federal court litigation as a result of Magistrate Sykes' decision. The required production of these letters in the federal court action destroyed forever the privilege attached to them. This privilege is destroyed irrespective of the outcome of MHI's pending Fifth Circuit appeal, which raises as a point of reversible error, the impropriety of the magistrate's disclosure order.

Following the issuance of Judge O'Neill's order, petitioner moved for leave to file a petition for writ of mandamus to the Court of Appeals, Fifth District of Texas, seeking review of Judge O'Neill's improper denial and breach of the attorney-client privilege in identical circumstances where many of the same communications had already been held to be protected by a federal magistrate judge in a companion proceeding. This motion was denied by order issued April 7, 1992. The unreported order of the Court of Appeals, Fifth District of Texas is reprinted in the Appendix hereto at 19a, *infra*. Thereafter, petitioner moved for leave to file a petition for writ of mandamus and application for immediate relief to the Supreme Court of Texas on April 10, 1992. On April 13, 1992, the Texas Supreme Court granted petitioner's motion for immediate temporary relief and stayed the March 18, 1992 order of Judge O'Neill. However, on May 27, 1992, the court denied petitioner's motion for leave to file a petition for writ of mandamus and vacated the stay order of April 13, 1992. *See* Appendix at 1a, *infra*. Petitioner timely filed a motion for rehearing on June 10, 1992 to the Supreme Court of Texas which motion was denied, without opinion, on July 1, 1992. The unreported order of the Supreme Court of Texas dated July 1, 1992 is reprinted in the Appendix hereto at 20a, *infra*.

On July 2, 1992, petitioner filed in the Supreme Court of Texas a motion for stay pending the filing of and final disposition by the Supreme Court of the United States on this petition for writ of certiorari. On July 8, 1992, the Texas Supreme Court denied petitioner's motion for a stay without opinion. The unreported decision of the Supreme Court of Texas is reprinted in the Appendix hereto at 22a, *infra*.

On July 8, 1992, Williams Aviation and Clayton W. Williams, Jr. moved to compel production of documents before Judge O'Neill. A hearing on this motion was held on August 7, 1992 before Judge O'Neill who stated his intention to order the disclosure of the confidential communications unless a stay was issued by the United States Supreme Court by September 4, 1992.

On August 21, 1992, petitioner filed an Application to Stay Mandate of the March 18, 1992 order addressed to United States Supreme Court Justice Antonin Scalia, Circuit Justice of the Fifth Circuit, which application was denied, without opinion, on August 25, 1992.

REASONS FOR GRANTING THE WRIT

The issue presented in this case involves the recognition of the attorney-client privilege as a matter of due process under the United States Constitution. As the attorney-client privilege is a cornerstone of our legal system, this issue has far reaching ramifications, both as to the substantive rights of the petitioner in this case and as to the rights of other litigants in future actions. The state court below failed to recognize the constitutional significance of the attorney-client privilege by ordering the disclosure of confidential oral and written communications between petitioner and its former attorney.

Petitioner submits that the attorney-client privilege is protected by the United States Constitutional guarantees of due process and right to counsel. If a civil litigant's confidential disclosures to and communications with counsel are required to be exposed, the right to counsel in civil actions, protected under the Fifth Amendment, will inevitably be compromised.

Given the highly regulated nature of aircraft manufacturing, the need of corporations such as MHI and MAI to have the advice of counsel, both for regulatory compliance and for the defense of claims that may be brought in numerous possible jurisdictions, is obvious. To subject the confidential communications of such corporations with their counsel to arbitrary determinations of privilege that may vary from one court to the next would effectively deny the corporations the confidential advice of counsel. At the very least, such corporations should be able to reasonably predict, based upon a minimum standard comporting with Constitutional due process, which oral and written communications with counsel will be protected by the privilege from disclosure, regardless of where suit is brought.

In this case, petitioner submits that the absence of any reasonable, minimum standard is readily apparent in the fact that the state court ordered, without opinion, full disclosure of confidential oral and written communications in the same circumstances where a federal judge, examining the same communications in the same factual setting upheld their nondisclosure because they were protected by the attorney-client privilege.

The scope of the attorney-client privilege with respect to oral and written communications made by an attorney and former general counsel of a corporation should be reviewed by the Court to establish a minimum standard for the protection of the attorney-client privilege comporting with the guarantees of due process and the right to counsel protected by the United States Constitution.

I

ARBITRARY DETERMINATIONS BY A COURT WHICH IGNORE THE ATTORNEY-CLIENT PRIVILEGE VIOLATE DUE PROCESS AND THE RIGHT TO COUNSEL

The Court has previously granted certiorari to review the important issues regarding the scope of the attorney-client privilege in the corporate context. *See Upjohn Company v. United States*, 449 U.S. 383 (1981).

The facts of this case warrant review by the Court on the important issue of whether oral and written communications made by and to an attorney and former general counsel of a corporation, which are based on confidential information provided to him while acting as attorney for the corporation, are protected from disclosure by the attorney-client privilege under the guarantees of due process and the right to counsel granted by the United States Constitution.

The United States Constitution, as a matter of due process, protects the right of citizens and corporations to be represented by counsel in civil matters in the courts of the United States. *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *Maness v. Meyers*, 419 U.S. 449, 471 (1975) (Stewart, J., concurring).

Intrinsic to effective representation by counsel, as the Court has recognized, is the attorney-client privilege.

As the Court held in *Upjohn v. United States*, 449 U.S. 383 (1981):

> Federal Rule of Evidence 501 provides that the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. [Cites] Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51 (1980): The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. And in *Fisher v. United States*, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be to encourage clients to make full disclosure to their attorneys. This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

449 U.S. at 389. *See also United States v. Zolin*, 491 U.S. 554 (1989).

The sanctity of this privilege, despite the Court's clear holding in *Upjohn*, was plainly disregarded by the Texas courts as to petitioner. As a result, petitioner's right to effective legal representation through its attorney's confidential advice and assistance was undermined by the discovery ordered by the Texas courts in violation of the attorney-client privilege.

In order for the attorney-client privilege to have any meaning, the client must have certainty that confidential information given to its attorney will not be disclosed at some future date. As the Court stated in *Upjohn*, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Id.* at 393. Moreover, if the client happens to be a corporation doing business across many jurisdictions and having to cope with a myriad of complex federal and local laws and regulations in the process, the need for access to effective counsel is critical. *See Upjohn*, 449 U.S. at 392. The need for certainty in the application of the attorney-client privilege is essential to a corporation's due process constitutional protection. The Court should review this issue to ensure both uniformity and certainty in the application of the attorney-client privilege, as a matter of constitutional due process.

One would be hard pressed to conjure up a fictional scenario wherein a client would have greater reason to fear what confidential communications would and would not be disclosed than petitioner in the present circumstances. The same confidential oral and written communications that were found to be protected and, thus, were denied to Williams Aviation in the federal court action, were ordered by the Texas state court to be disclosed to Williams Aviation for use in a separate litigation arising out of the same facts. The identity of parties and counsel, facts and issues in the two courts virtually assures that Williams Aviation will, subject only to possible exclusion on some basis other than attorney-client privilege, be able to use

the confidential communications in the federal court action, notwithstanding the district court's order in that case, should a new trial be ordered by the Fifth Circuit. Petitioner's constitutional entitlement to due process and right to counsel has been abridged by the state court's disregard for the attorney-client privilege that attaches to its confidential communications with counsel. Petitioner is effectively denied due process and right to counsel if it cannot confer freely and openly with its counsel without fear that a court will fail to uphold the attorney-client privilege. Indeed, a "privilege" arbitrarily decided may be said to be worse than no privilege at all.

The applicability of the attorney-client privilege must be adjudicated by the court when a discovery objection on such grounds is raised. *See Chase Manhattan Bank v. Turner & Newall, PLC*, 964 F.2d 159 (2d Cir. 1992). With regard to Mr. Vinton's conversations, Magistrate Sykes, in his adjudication of the privilege issue in the federal court, clearly saw that it would be impossible to protect the confidential portions of the communications from disclosure if a further deposition were to be allowed on these subjects. As the Court stated in *Maness v. Meyers*, 419 U.S. 449, 460 (1975), courts cannot always "unring the bell" once privileged information has been inadvertently released. Recognizing that Mr. Vinton himself has admitted his inability to separate "intertwined" information consisting of both privileged and unprivileged matter, Magistrate Sykes ordered that the requested disclosure not be made.

In the state court, Judge O'Neill, in contrast to Magistrate Sykes, made no adjudication of the attorney-client privilege, but simply ordered Mr. Vinton to be deposed on the subject of his oral communications.

With regard to the written communications at issue, neither Judge O'Neill nor any of the Texas appellate courts made an "adjudication" as to whether the privilege applies. Judge O'Neill merely ordered the letters to be disclosed, without reason or opinion on the merits of the objection. In these circumstances, Judge O'Neill's order amounted to a violation of due process.

As Justice Harlan wrote in *Poe v. Ullman*, 367 U.S. 497 (1961):

> The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process . . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession.

367 U.S. at 544-545. See also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. ____, 120 L.Ed.2d 674, 696-697 (1992).

The attorney-client privilege, fundamental as it is to a citizens's right to be represented by counsel in the courts of this country, is and must be protected by the Constitution, as essential to due process and the administration of justice.

The action of the Texas Court in this case was a denial of such due process rights of the petitioner, which the Court should review and correct.

II

A GENUINE CONFLICT THAT THE COURT SHOULD RESOLVE EXISTS AMONG THE STATES WHERE THE ATTORNEY-CLIENT PRIVILEGE IS APPLIED TO FORMER CORPORATE COUNSEL

The acute disparity in the treatment of the attorney-client privilege by the state and federal courts in this case mirrors the disparity in treatment of the privilege by the highest courts of at least two states, Texas and Ohio, in cases where the communications of former corporate counsel are involved.

In *American Motors Corp. v. Huffstutler*, 61 Ohio St. 3d 343, 575 N.E.2d 116 (Ohio 1991), a former employee, attorney and technical specialist for AMC Jeep, was permanently enjoined from testifying as a plaintiff's expert or as any other type of witness against AMC Jeep and from disclosing his former employer's trade secrets and confidential information, the knowledge of which he had derived from his employment in AMC Jeep's legal department and as a member of its product liability defense team. A copy of the *Huffstutler* decision is reprinted in the Appendix hereto at 26a, infra. Following termination of his employment with AMC Jeep, defendant Huffstutler sought to become an "expert witness", offering the services of his testimony against AMC Jeep to plaintiffs' lawyers in product liability cases.

Reinstating the trial court's permanent injunction against Huffstutler that had been vacated by the lower appellate court, the Ohio Supreme Court reversed the appellate court. In its opinion, the high court noted that the trial court had found:

> that during his employment as manager of the Product Design Studies Group, Huffstutler was an agent of AMC Jeep's Legal Department and frequently gave legal advice and performed legal analysis; that he served from 1981 to 1982 as an important member of the products liability defense team; that he represented AMC Jeep as counsel in products liability matters and routinely consulted with AMC Jeep's legal staff and retained counsel; that he assisted AMC Jeep's legal staff in retaining expert witnesses and met with experts to prepare strategy for defense; that he recommended outside counsel; that he suggested lines of testimony and cross-examination; and that he gave generously of his engineering judgment and legal training to assist counsel in the preparation of defenses.
>
> . . . Huffstutler had access to confidential attorney-client information, attorney work product information involving

> rollover and other litigation, and highly confidential trade secrets.

Id. at 345.

In such circumstances, the Ohio Supreme Court concluded that "Huffstutler was, at minimum, an agent acting on behalf of legal counsel to AMC." *Id.* at 346. He was therefore, in the court's opinion, "subject to all the legal implications of the attorney-client and attorney work product privileges." *Id.* (citations omitted).[4]

In the present case, the Texas Supreme Court, by denying petitioner's motion for leave to file a writ of mandamus, let stand the order of a lower Texas state court that runs contrary to the decision of the United States District Court on precisely the same facts. Moreover, on nearly identical facts, the Texas state court order in this case is directly contrary to the Ohio Supreme Court's decision in *Huffstutler*. Since the attorney-client privileges in Texas and Ohio are substantively the same,[5]

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4 The Ohio Supreme Court rejected as "simply unsupported by the record", Huffstutler's claim that he was a "whistle blower" (he was no longer an employee of AMC Jeep when he began to disclose information) as well as his argument that the injunction would "gag" other AMC Jeep employees. *Id.* at 348.

5 The Ohio Rules of Evidence provide:

> The privilege of a witness, person, state . . . shall be governed by statute . . . or by principles of common law as interpreted by the courts of this state in light of reason and experience.

Ohio R. Evid. 501. The attorney-client privilege is found in § 2317.02, which provides, in pertinent part:

> The following person shall not testify in certain respects. (A) An attorney, concerning a communication made to him by his client in that relation or his advice to his client. . . .

Ohio Rev. Code Ann. § 2317.02(A) (Anderson 1991).

The Texas Rules of Evidence provide:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . .

TEX. R. EVID. 503(b) (West 1991).

the refusal of the Texas Supreme Court to overturn the order compelling disclosure of privileged communications creates a genuine conflict between the highest court of the state of Texas and the highest court of the state of Ohio regarding the application of the attorney-client privilege with respect to former corporate counsel.

Texas courts previously have held that "the purpose of the attorney-client privilege is to promote the unrestrained communication and contact between an attorney and client in all matters in which the attorney's professional advice or services are sought, without fear that these confidential communications will be disclosed by the attorney, voluntarily or involuntarily, in any legal proceeding." *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978); *Mortgageamerica Corp. v. Am. Nat'l Bank of Austin*, 651 S.W.2d 851, 857 (Tex. App.—Austin 1983, writ ref'd n.r.e.); *National Sur. Corp. v. Dominguez*, 715 S.W.2d 67, 69 (Tex. App.—Corpus Christi 1986, no writ).

In a manner similar to the defendant in *Huffstutler*, Mr. Vinton's knowledge initially was gathered in the context of pending and potential litigation arising from other accidents involving similar aircraft. Such communications were made available to Mr. Vinton because of his role as general counsel and to develop defense strategies in such litigation. It is clear in this case that information gathered and/or communicated in the defense of litigation arising from other MU-2 aircraft accidents was intended and relied upon by petitioner to remain confidential and must be protected.

Petitioner submits that the conflict between the highest Texas and Ohio courts' interpretations of the attorney-client privilege in similar circumstances carries serious implications for corporations that, unlike individuals, frequently find themselves subject to suit in multiple forums and jurisdictions, often in matters arising from the same operative facts and involving some or all of the same parties. In such circumstances, varying and inconsistent interpretations by different tribunals of the same privilege make compliance with one court order impossible without violating, or losing the benefit of, another court

order that may involve the same facts and the same parties. In the interest of uniformity and to preserve this important privilege, this Court should resolve such conflict.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MARSHALL S. TURNER
Counsel of Record
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—and—

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4100 Renaissance Tower
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(214) 698-4100

Attorneys for Petitioner MITSUBISHI HEAVY INDUSTRIES, LTD., individually and on behalf of MITSUBISHI AIRCRAFT INTERNATIONAL INC., a dissolved corporation.

Of Counsel:

Thomas J. Whalen
Edward G. Petraglia
Kathleen A. Fahey

Dated: September 3, 1992

APPENDIX

INDEX TO APPENDIX

	PAGE
Order of the Supreme Court of Texas, dated May 27, 1992 denying petitioner leave to file a writ of mandamus	1a
Order of Judge O'Neill regarding William Aviation's Motion to Overrule MHI's Objections to the Deposition of Raymond S. Vinton, dated March 18, 1992	3a
Opinion and Order of Magistrate Judge Sykes on William Aviation's Motion to Overrule MHI's Objections to the Deposition Duces Tecum of Raymond S. Vinton, dated January 24, 1992	7a
Order of the Honorable Lucius D. Bunton, Chief Judge of the United States District Court for the Western District of Texas dated March 19, 1992	13a
Letter from Mr. Sam Nakagawa to Raymond S. Vinton, Esq. dated May 7, 1990	15a
Letter from Mr. Raymond S. Vinton to Mr. S. Nakagawa dated May 16, 1990	17a
Order of the Court of Appeals, Fifth Judicial District of Texas, dated April 7, 1992 denying petitioner leave to file petition for mandamus	19a
Order of the Supreme Court of Texas dated July 1, 1992 overruling petitioner's motion for rehearing of motion for leave to file petition for writ of mandamus	20a
Order of the Supreme Court of Texas dated July 8, 1992 overruling petitioner's motion for stay of trial court order pending writ of certiorari	22a

PAGE

Opinion of the Ohio Supreme Court in American Motors Corp. v. Huffstutler dated August 14, 1991 and reported at 61 Ohio St.3d 343, 575 N.E.2d 116 26a

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

May 27, 1992

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RE: Case No. D-2283

Style: MITSUBISHI HEAVY INDUSTRIES, LTD., individually and on behalf of MITSUBISHI AIRCRAFT INTERNATIONAL, INC., a dissolved corporation v. THE HONORABLE MICHAEL J. O'NEILL, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for leave to file petition for writ of mandamus in the above styled case. Stay Order issued by this Court on April 13, 1992, is vacated and set aside.

Sincerely,

John T. Adams, Clerk

by /s/ Blanca Morin
Blanca Morin, Deputy

cc: The Hon. Michael J. O'Neill

IN THE DISTRICT COURT OF DALLAS COUNTY,
TEXAS 193RD JUDICIAL DISTRICT

NO. 90-09774-L

CONSOLIDATED WITH NOS. 90-10172-H/L
90-10066-H/L, 90-10107-L, 90-10168-L, 90-10103-G/L

LINDA A. MARDIS, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF KENNETH B. MARDIS, SHANNON MARDIS CAMPBELL AND TARA MARDIS, SURVIVING CHILDREN OF KENNETH B. MARDIS, DECEASED,
Plaintiff,

v.

MITSUBISHI HEAVY INDUSTRIES, LTD., MITSUBISHI AIRCRAFT INTERNATIONAL, INC., AND AIRCRAFT MAINTENANCE, INC.,
Defendants.

MITSUBISHI HEAVY INDUSTRIES, LTD.,
Third-Party Plaintiff,

v.

WILLIAMS AVIATION COMPANY AND
CLAYTON W. WILLIAMS, JR.,
Third-Party Defendants.

ORDER REGARDING WILLIAM AVIATION COMPANY'S AND CLAYTON WILLIAMS, JR.'S MOTION TO OVERRULE MHI'S OBJECTIONS TO THE DEPOSITION OF RAYMOND S. VINTON

On January 31, 1992, the Court considered the Motion of Williams Aviation Company and Clayton Williams, Jr., to overrule MHI's objections to the deposition of Raymond S. Vinton. At the hearing, the Court ordered counsel for Mitsu-

bishi to produce the documents in question to the Court for *in camera* review. After conducting *in camera* review, the Court hereby ORDERS as follows with respect to the subject letters:

Letter of 2-15-90 (*Document #3* in deposition) from Mr. Vinton to S. Nakagawa, who, according to Mr. Vinton, became president of MAI after the dissolution and remained president on 2-15-90. (Pp. 59-60).	TO BE PRODUCED/ ~~NOT TO BE PRODUCED~~
Letter of 3-2-90 (*Document #4* in deposition) from Mr. Vinton to Yotaro Iida, president of MHI. (P. 49).	TO BE PRODUCED/ ~~NOT TO BE PRODUCED~~
Letter of 3-12-90 (*Document #5* in deposition) from Mr. Nakagawa to Mr. Vinton. (Pp. 55-56).	TO BE PRODUCED/ ~~NOT TO BE PRODUCED~~
Letter of 3-26-90 (*Document #6* in deposition) from Mr. Vinton to Mr. Nakagawa.	TO BE PRODUCED/ ~~NOT TO BE PRODUCED~~
Letter of 4-4-90 (*Document #7* in deposition) from Mr. Nakagawa to Mr. Vinton. (Pp. 55-56).	TO BE PRODUCED/ ~~NOT TO BE PRODUCED~~
Letter of 4-23-90 (*Document #8* in deposition) from Mr. Vinton to Mr. Nakagawa.	TO BE PRODUCED/ ~~NOT TO BE PRODUCED~~
Letter of 4-26-91 (*Document #9* in deposition) from Mr. Vinton to Mr. Turner, counsel for MHI.	TO BE PRODUCED/ ~~NOT TO BE PRODUCED~~

Letter of 5-7-90 (*Document #10* in deposition) from Mr. Nakagawa to Mr. Vinton. (Pp. 55-56).	TO BE PRODUCED/ ~~NOT TO BE PRODUCED~~
Letter of 5-16-90 (*Document #11* in deposition) from Mr. Vinton to Mr. Nakagawa.	TO BE PRODUCED/ ~~NOT TO BE PRODUCED~~
Letter of 5-24-90 (*Document #12* in deposition) from Mr. Vinton to Mr. Nakagawa. (Pp. 94-95).	TO BE PRODUCED/ ~~NOT TO BE PRODUCED~~

With regard to the subject conversations, the Court hereby ORDERS as follows:

Conversations beginning on 2-14-90 between Mr. Vinton and Bill Cole, a former officer of MAI. (Pp. 44-45, 74-77).	SHALL BE DISCLOSED/* ~~SHALL NOT BE DISCLOSED~~
Conversations between Mr. Vinton and other former employees of MAI, including but not limited to Tom McGregor and Tom Everette. (Pp. 89-90).	SHALL BE DISCLOSED/* ~~SHALL NOT BE DISCLOSED~~
Conversations between Mr. Vinton and Marshall Turner, counsel for MHI. (Pp. 90-92).	SHALL BE DISCLOSED/* ~~SHALL NOT BE DISCLOSED~~

---

* [handwritten by Judge Michael J. O'Neill vertically beside these three items:

except for information received by Mr. Vinton while employed as counsel for MAI which arose from confidential communications made for the purpose of rendering professional services to MAI]

Mitsubishi Heavy Industries, Ltd., and Mitsubishi Aircraft International, Inc., shall comply with this Order not later than seven (7) days from the date hereof.

SIGNED on the 18 day of ~~February~~ [March *MJO*] 1992.

/s/ Michael J. O'Neill
JUDGE PRESIDING

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

NO. MO-91-CA-111

WILLIAMS AVIATION COMPANY

vs.

MITSUBISHI AIRCRAFT INTERNATIONAL, INC., AND MITSUBISHI HEAVY INDUSTRIES LTD., Individually and as Sole Shareholder of MITSUBISHI AIRCRAFT INTERNATIONAL, INC.

ORDER ON WILLIAM AVIATION COMPANY'S MOTION TO OVERRULE MHI'S OBJECTIONS TO THE DEPOSITION DUCES TECUM OF RAYMOND S. VINTON

On January 22, 1992, came on for hearing William Aviation Company's Motion to Overrule MHI's Objections to the Deposition Duces Tecum of Raymond S. Vinton in the above-entitled and numbered cause.

In such Motion, Plaintiff urged: (1) Mr. Vinton was not being asked to testify concerning communications received while acting as an employee/general counsel of Defendant Mitsubishi Aircraft International, Inc. (hereafter called Defendant MAI) or as a contractual/general counsel of Defendant MAI, but to only testify regarding information he learned after termination of his relationship with Defendant MAI; (2) no letters between Mr. Vinton and Mitsubishi representatives, after February 14, 1990 (the date of the crash of Plaintiff's aircraft, Tail No. N300CW), gave or sought legal advice; (3) Mr. Vinton was not acting as general counsel for Defendant MAI when formulating and transmitting his 1990 communications to Defendant MAI; and (4) insofar as concerns communications between Bill Cole, Tom McGregor,

and Tom Everette (former employees of MAI), such employees were not members of Defendant MAI control group. Plaintiff also asserted that the dissolved corporation, Defendant MAI, could not assert the attorney-client privilege to communications made on or after February 14, 1990, as it had ceased to exist.

Basically, at the January 22, 1992 hearing, Defendant Mitsubishi Heavy Industries, Ltd. (hereafter called Defendant MHI) claimed it could assert the attorney-client privilege as the sole shareholder of Defendant MAI, the dissolved corporation, protecting client to attorney communications, which disseminated information to Mr. Vinton while he was employee/general counsel and contractual/general counsel.

The Court finds that Defendant MHI, the sole shareholder of the dissolved corporation, Defendant MAI, can assert the attorney-client privilege of Defendant MAI, as it is the successor to Defendant MAI, whether or not Defendant MAI is currently in existence. Communications, once privileged, do not lose their privileged status by reason of the termination of the attorney-client relationship.

At the January 22, 1992 hearing on Plaintiff's Motion, insufficient information was provided for the Court to rule on the attorney-client privilege of the written communications, or verbal communications, the subject of Plaintiff's Motion. The Court Ordered Defendant MHI to tender for *in camera* inspection copies of the ten documents listed on page 4 of Plaintiff's Motion by 11:00 a.m. January 23, 1992. The Court further Ordered Defendant MHI to submit an Affidavit from Mr. Vinton concerning the substance of his conversations with Bill Cole, Tom McGregor, and Tom Everette.

Copies of the documents specified on page 4 of Plaintiff's Motion have been examined *in camera* by the Court, and will be addressed separately below.

The February 15, 1990 letter from Raymond S. Vinton to S. Nakagawa, President, Mitsubishi Aircraft International, Inc., Mr. Vinton's former client, concerned the February 14, 1990 crash of N300CW and other matters. In this correspondence, Mr. Vinton referred to other matters, which matters were obviously the subject of attorney-client communications

between Mr. Vinton and his dissolved client, Defendant MAI. Because matters the subject of previous attorney-client communications between Mr. Vinton and his former client, Defendant MAI, are discussed in the February 15, 1990 letter, IT IS ORDERED that Mr. Vinton's February 15, 1990 letter to S. Nakagawa, President, Mitsubishi Aircraft International, Inc., shall not be disclosed to Plaintiff in these proceedings.

The March 2, 1990 letter from Raymond S. Vinton to Yotaro Iida, President and Managing Director, Mitsubishi Heavy Industries, Ltd., only concerned Mr. Nakagawa's and/or Defendant MAI's non-response to the February 15, 1990 letter from Mr. Vinton to Mr. Nakagawa. The Court can not separate the non-privileged information from privileged information. Accordingly, IT IS ORDERED that Mr. Vinton's March 2, 1990 letter to Yotaro Iida, President and Managing Director, Mitsubishi Heavy Industries, Ltd., shall not be disclosed to Plaintiff in these proceedings.

The March 12, 1990 letter from S. Nakagawa, President, Mitsubishi Aircraft International, Inc., to Raymond Vinton was made in response to the February 15 and March 2, 1990 letters from Mr. Vinton. The Court finds that this March 12, 1990 letter from Mr. Nakagawa does not seek legal advice from Mr. Vinton. It was not made for the purpose of facilitating rendition of professional legal services to Defendant MAI. It is simply correspondence from a dissolved former client (Defendant MAI) to its former attorney (Mr. Vinton). Since it does not meet the criteria of a client to attorney communication made for the purpose of facilitating the rendition of professional legal services to the dissolved Defendant MAI, it is not a privileged communication. Accordingly, IT IS ORDERED that Defendants shall produce a true and correct copy of the March 12, 1990 letter from S. Nakagawa, President, Mitsubishi Aircraft International, Inc., to Raymond Vinton.

The March 26, 1990 letter from Raymond S. Vinton to S. Nakagawa, President, Mitsubishi Aircraft International, Inc., contains information reflective of communications Mr. Vinton received while counsel for Defendant MAI. The Court

can not separate the non-privileged information from the privileged information. Accordingly, IT IS ORDERED that the March 26, 1990 letter from Raymond S. Vinton to S. Nakagawa, President, Mitsubishi Aircraft International, Inc., shall not be disclosed to Plaintiff in these proceedings.

The April 4, 1990 letter from S. Nakagawa, President, Mitsubishi Aircraft International, Inc., to Raymond Vinton is a response to the communications from the former counsel of the dissolved Defendant MAI. However, Mr. Nakagawa's April 4, 1990 letter to Mr. Vinton was not made for the purpose of facilitating the rendition of professional legal services to the dissolved Defendant MAI. Accordingly, IT IS ORDERED that defendants shall produce a true and correct copy of the April 4, 1990 letter from S. Nakagawa, President, Mitsubishi Aircraft International, Inc., to Raymond Vinton.

The April 23, 1990 letter from Raymond S. Vinton to S. Nakagawa, President, Mitsubishi Aircraft International, Inc., contains phrases reflective of communications made from Defendant MAI to Mr. Vinton which were privileged under the attorney-client relationship. Accordingly, IT IS ORDERED that the April 23, 1990 letter from Raymond S. Vinton to S. Nakagawa, President, Mitsubishi Aircraft International, Inc., shall not be disclosed to Plaintiffs in these proceedings.

The April 26, 1990 letter from Raymond S. Vinton to Marshall S. Turner is a communication from the dissolved Defendant MAI's former counsel to its, and Defendant MHI's, attorney in this cause. The majority of the communication contains no language reflective of information obtained by Mr. Vinton as attorney for the dissolved Defendant MAI. However, since it does contain a reference to Defendant MAI's posture in this and other litigation, which is reflective of information received by Mr. Vinton pursuant to attorney-client communications, IT IS ORDERED that the April 26, 1990 letter from Raymond S. Vinton to Marshall S. Turner shall not be disclosed to Plaintiffs in these proceedings.

The May 7, 1990 letter from Sam Nakagawa, President, Mitsubishi Aircraft International, Inc., to Raymond S. Vinton is in response to previous correspondence from Mr. Vin-

ton. Such May 7, 1990 letter from Mr. Nakagawa discusses Mr. Vinton's previous correspondence, Defendant MAI's work with governmental agencies, causes of recent accidents, remedies for those causes, and other matters. Such May 7, 1990 letter does not seek legal advice, and was not made for the purpose of facilitating rendition of professional legal services to the dissolved Defendant MAI. It does not fall within the definitions of a attorney-client privileged communication. IT IS ORDERED that Defendants shall produce a true and correct copy of the May 7, 1990 letter from Sam Nakagawa, President, Mitsubishi Aircraft International, Inc., to Raymond S. Vinton.

The May 16, 1990 letter from Raymond S. Vinton to S. Nakagawa, President, Mitsubishi Aircraft International, Inc., concerns the May 7, 1990 letter from Mr. Nakagawa to Mr. Vinton discussed above. Since this May 16, 1990 letter contains no language reflective of privileged information obtained pursuant to an attorney-client communication to Mr. Vinton while attorney for the dissolved Defendant MAI, IT IS ORDERED that Defendants shall produce a true and correct copy of the May 16, 1990 letter from Raymond S. Vinton to S. Nakagawa, President, Mitsubishi Aircraft International, Inc.

The May 24, 1990 letter from Raymond S. Vinton to S. Nakagawa, President, Mitsubishi Aircraft International, Inc., only concerns a letter to the editor from a former pilot of Defendant MAI, Bill Evans, which was published in *Aviation International News* on an unspecified date. IT IS ORDERED that Defendants shall produce a true and correct copy of the May 24, 1990 letter from Raymond S. Vinton to S. Nakagawa, President, Mitsubishi Aircraft International, Inc.

Plaintiff's Motion also concerned conversations between Mr. Vinton and Bill Cole, a former officer of Defendant MAI, and two other former employees of Defendant MAI, Tom McGregor and Tom Everette, as well as conversations between Mr. Vinton and Marshall Turner, attorney for Defendants. In his deposition, Mr. Vinton stated it was impossible for him to extricate from his conversations with Bill Cole the information imparted to Mr. Vinton by Mr.

Cole about the crash of N300CW from the intertwined information which may or may not have been the subject of attorney-client communications between Defendant MAI and Mr. Vinton while he was its attorney. Communications from Mr. Vinton to the Court, reviewed *in camera*, reveal that the same applies to conversations between Mr. Vinton and Tom McGregor, as well as to conversations between Mr. Vinton and Tom Everette. Since Mr. Vinton in unable to separate the information received from Mr. Cole, Mr. McGregor, and Mr. Everette after February 14, 1990 from that received from them (apparently as former employees of Defendant MAI), IT IS ORDERED that the substance of the conversations between Mr. Vinton and Bill Cole, Tom McGregor, and Tom Everette shall not be disclosed to Plaintiff in these proceedings.

This Order does not go so far as to find the dissolved Defendant MAI waived attorney-client privilege as to the subject matter of the client to attorney communications it made to Mr. Vinton before it was dissolved sometime in the late 1980's.

It should be noted that the letters from Mr. Nakagawa to Mr. Vinton are not found to be subject to the attorney-client privilege for the reason that, in those letters, Mr. Nakagawa, on behalf of Defendant MAI, did not seek legal advice from Mr. Vinton.

SIGNED and ENTERED January 24, 1992.

/s/ Robert R. Sykes
ROBERT R. SYKES
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

MO-91-CA-111

WILLIAMS AVIATION COMPANY,

Plaintiff,

v.

MITSUBISHI AIRCRAFT INTERNATIONAL, INC., ET AL.,

Defendants.

ORDER

BEFORE THIS COURT are defendant Mitsubishi Heavy Industries, Ltd.'s Rule 72(a) objections to the Order of United States Magistrate Judge Robert R. Sykes on Williams Aviation Company's Motion to Overrule MHI's Objections to the Deposition Duces Tecum of Raymond S. Vinton, dated January 24, 1992, and Plaintiff Williams Aviation Company's Cross-Appeal of the January 24, 1992 order. The Court, having considered the objections and Affidavit of Marshall S. Turner, and the arguments of the plaintiff, finds the decision of Magistrate Judge Sykes should be affirmed. Accordingly,

IT IS ORDERED defendant Mitsubishi Heavy Industries, Ltd.'s Federal Rules of Civil Procedure Rule 72(a) and Local Rule 4(a) objections to the Order of United States Magistrate Judge Robert R. Sykes dated January 24, 1992 are DENIED.

IT IS FURTHER ORDERED plaintiff's cross-appeal of the January 24, 1992 order is DENIED.

IT IS FINALLY ORDERED the January 24, 1992 order entered by Magistrate Judge Sykes is AFFIRMED in all respects.

SIGNED this 19th day of March, 1992.

/s/ Lucius D. Bunton

HONORABLE LUCIUS D. BUNTON
CHIEF JUDGE

MITSUBISHI AIRCRAFT INTERNATIONAL, INC.

May 7, 1990

Raymond S. Vinton, Esq.
One Galleria Tower
Suite 1910
13355 Noel Road
Dallas, Texas 75240

Dear Ray,

I am frankly very much surprised by the comments contained in your recent letter and I find it difficult to accept that you believe all that you have expressed in your letters.

We are very concerned about all accidents and we are actively working with the U.S. FAA and the Australian CAA, as well as conducting our own investigations and analyses, to determine the cause(s) of recent accidents. If it is determined that the cause(s) is within our power to remedy, we are determined to take all corrective measures as quickly as possible. If it is determined that the cause(s) is within the power of others to correct, we will do everything we can to encourage those responsible to take all corrective measures.

However, we do not intend to alter the design of the MU-2 unless and until it is determined that a change is advisable. While it is easy to develop unsupported theories of the causes of airplane accidents and to demand that unspecified corrective actions be taken, such an approach by a manufacturer could be dangerous. Making unnecessary changes could result in a safe aircraft design being made less safe and could divert energies away from determining the real cause(s) and finding the correct solution(s).

The accident theory expressed in your letter of April 23, 1990 is without any factual basis and has serious theoretical limitations. The possibility of airframe icing being a contributing cause of accidents is one area we have analyzed in the

past and are continuing to thoroughly analyze. If we discover any shortcomings of the MU-2 in this area, we will take prompt appropriate remedial action.

Whether you chose to discuss your "thoughts with the appropriate U.S. Government agencies and the U.S. Congress" or with anyone else, is your decision to make. As an attorney, and as MAI's former attorney, I assume that you are fully aware of your legal, contractual and ethical rights and obligations and will act accordingly.

You have my assurance that it is our intent, as it always has been, to make the MU-2 as safe as we can.

If you have any factual support for your theory or any factual information, which would assist us improving the safety of the MU-2, we would welcome your further correspondence. However, we do not intend to respond to unsupported and baseless accusations and threats in the future.

Very truly yours,

/s/ SAM NAKAGAWA
Sam Nakagawa
President

RAYMOND S. VINTON
Attorney at Law
16 May 1990

BY TELECOPY AND U.S. MAIL

Mr. S. Nakagawa
President
Mitsubishi Aircraft International, Inc.
c/o Aircraft & Equipment Department
Mitsubishi Heavy Industries, Ltd.
Tokyo, Japan

Re: *Your 7 May 1990 Letter*

Dear Mr. Nakagawa:

Your recent letter is a disappointment. It is clear to me by reading the defensive rhetoric in the letter that Mitsubishi's only concern is protection from liability or liability reduction. These may be admirable goals for lawyers assigned the task of defending an aircraft manufacturer and its product liability insurance carrier, but they are not, in my mind, the proper goals for a manufacturer which should be primarily concerned for the safety and welfare of people flying in the aircraft.

The words in you letter ring false. I do not believe, in view of my years with Mitsubishi, what you say about the motivation for accident investigation. It seems that accident investigation is a euphemism for investigative work done at the behest of product liability attorneys defending against claims. You have convinced me that you have a completely closed and defensive mind set and will not look into the theory suggested to you, therefore further dialogue would be unproductive.

Notwithstanding your not so subtle threat to keep quiet, I will endeavor to cause the problem with the long-body MU-2

to receive the attention it needs and, God willing, the issue can be properly analyzed and solved.

Sincerely,

/s/ Raymond S. Vinton
Raymond S. Vinton

RSV:mf

cc: Mr. Yotaro Iida, President and Managing Director, MHI

Order issued April 7, 1992

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS
No. 05-92-00709-CV

MITSUBISHI HEAVY INDUSTRIES, LTD., ET AL.,

Relator,

—v.—

THE HONORABLE MICHAEL J. O'NEILL, JUDGE 193rd JUDICIAL DISTRICT COURT DALLAS COUNTY, TEXAS,

Respondent.

ORDER

Before Justices Baker and Rosenberg

We DENY relators' March 24, 1992 motion for leave to file petition for writ of mandamus.

We DISSOLVE the stay imposed by this Court's order of March 24, 1992. The Clerk of this Court is directed to return the sealed documents to relators' counsel.

/s/ JAMES A. BAKER
James A. Baker
Justice

THE SUPREME COURT OF TEXAS
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John T. Adams, Clerk

July 1, 1992

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RE: Case No. D-2283

Style: MITSUBISHI HEAVY INDUSTRIES, LTD., individually and on behalf of MITSUBISHI AIRCRAFT INTERNATIONAL, INC., a dissolved corporation v. THE HONORABLE MICHAEL J. O'NEILL, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for rehearing of motion for leave to file petition for writ of mandamus in the above referenced case.

Sincerely,

JOHN T. ADAMS, Clerk

by /s/ Courtland Crocker
Courtland Crocker, Deputy

cc: The Hon. Michael J. O'Neill

THE SUPREME COURT OF TEXAS
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July 8, 1992

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RE: Case No. D-2283

Style: MITSUBISHI HEAVY INDUSTRIES, LTD., individually and on behalf of MITSUBISHI AIRCRAFT INTERNATIONAL, INC., a dissolved corporation v. THE HONORABLE MICHAEL J. O'NEILL, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for stay of trial court order pending writ of certiorari in the above referenced case.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Tencha Damian
Tencha Damian, Deputy

cc: The Hon. Michael J. O'Neill

ORDERS OF THE SUPREME COURT OF TEXAS
Pronounced July 8, 1992

MISCELLANEOUS

THE MOTION FOR STAY OF TRIAL COURT ORDER PENDING WRIT OF CERTIORARI IS OVERRULED:

D-2283, MITSUBISHI HEAVY INDUSTRIES, LTD., individually and on behalf of MITSUBISHI AIRCRAFT INTERNATIONAL, INC., a dissolved corporation v. THE HONORABLE MICHAEL J. O'NEILL, JUDGE; from Dallas County; 5th district (05-92-00709-CV, 04-07-92)

AMERICAN MOTORS CORPORATION ET AL., APPELLANTS AND CROSS-APPELLEES, *v.* HUFFSTUTLER, APPELLEE AND CROSS-APPELLANT

[*Cite as American Motors Corp. v. Huffstutler* (1991), 61 Ohio St.3d 343.]

Attorneys at law—Attorney has no right to disseminate information protected by the attorney-client privilege—Injunctive relief is appropriate to protect the attorney-client and work product privilege, when.

1. An attorney has no right under the First Amendment to the United States Constitution or Section 11, Article I of the Ohio Constitution to disseminate information protected by the attorney-client privilege.

See: West's Ohio Digest, Constitutional Law 90.1(1.5), Witnesses 198(1).

2. In order to protect the attorney-client and work product privilege, injunctive relief is appropriate, particularly where it is demonstrated that the attorney has already violated the privilege and threatens to continue such practice.

See: West's Ohio Digest, Injunction 94.

(No. 90-416—Submitted April 10, 1991—Decided August 14, 1991.)

APPEAL and CROSS-APPEAL from the Court of Appeals for Wood County, No. WD-89-54.

In May 1989, the Wood County Court of Common Pleas permanently enjoined appellee and cross-appellant, Rahn M. Huffstutler, from disclosure of trade secrets, confidential information, or matters of attorney-client privilege or attorney-client work product of appellant and cross-appellee, American Motors Corporation ("AMC"), relating to the sub-

ject matter of any products liability litigation which Huffstutler received, had knowledge of or was entrusted with during his employment with AMC and its subsidiary, Jeep Corporation ("AMC Jeep").

He was further enjoined from testifying and consulting with attorneys or their agents in products liability litigation involving AMC without AMC's consent or an order of the trial court.

The court further ordered that Huffstutler return forthwith all writings, materials, and documents removed by him without authority from the possession of AMC, including copies.

The trial court also entered summary judgment for AMC on Huffstutler's amended counterclaim sounding in malicious interference with contractual relations.

In March 1990, the Wood County Court of Appeals, in a divided decision, vacated the permanent injunction prohibiting disclosing, testifying, or consulting, while leaving intact the order to return documents. The court affirmed the summary judgement on Huffstutler's counterclaim.

Huffstutler was hired by AMC Jeep as an engineer in 1974. In 1988, AMC was acquired by Chrysler Corporation and Huffstutler's employment was terminated.

During his early employment, Huffstutler attended law school, with partial assistance from his employer. He attended products liability litigation seminars, and was admitted to the Ohio Bar in 1979. In 1981, he became manger of the Product Design Studies Group and worked intimately with the legal department and its privately retained counsel in products liability cases involving AMC Jeep, particularly "rollover" claims.

In 1983, he became a technical specialist with duties including new vehicle model and production analysis. He returned from Detroit to Toledo in 1984 as Manager of Quality Services for AMC Jeep.

Upon termination he advised his employer that he "must create a market for [his] unique talents * * *." He thereupon created an enterprise serving as an expert witness. These contacts included attorneys involved as plaintiffs' counsel in Jeep rollover litigation against his former employer.

Following one such contact, Huffstutler was retained in a pending Jeep rollover claim by plaintiffs' counsel, to whom he provided materials and documents which AMC contends were confidential and privileged and were taken from AMC Jeep without authority. These documents were subsequently identified by plaintiffs' counsel on his exhibit list in a case filed against AMC in the United States District Court for the Eastern District of Oklahoma. They included memos prepared at the direction of AMC's legal staff.

The trial court found that during his employment as manager of the Product Design Studies Group, Huffstutler was an agent of AMC Jeep's Legal Department and frequently gave legal advice and performed legal analysis; that he served from 1981 to 1982 as an important member of the products liability defense team; that he represented AMC Jeep as counsel in products liability matters and routinely consulted with AMC Jeep's legal staff and retained counsel; that he assisted AMC Jeep's legal staff in retaining expert witnesses and met with experts to prepare strategy for defense; that he recommended outside counsel; that he suggested lines of testimony and crossexamination; and that he gave generously of his engineering judgment and legal training to assist counsel in the preparation of defenses.

The trial court also found that Huffstutler had access to confidential attorney-client information, attorney work product information involving rollover and other litigation, and highly confidential trade secrets. He improperly removed the confidential and privileged documents and material and sold them to plaintiffs' counsel in litigation against AMC, offering himself as an expert witness against his former employer in expectation of a significant monetary reward.

The court found that confidential information concerning the development of new vehicle design constituted "trade secrets" under R.C. 1333.51(A)(3).

The permanent injunction recites, *inter alia,* that:

" * * * [T]he defendant is hereby enjoined from the following acts or conduct:

"1. Consulting or discussing with or disclosing to any counsel or other attorney or person any of the Plaintiff's trade secrets, confidential information or matters of attorney-client privilege or attorney client work product relating in any manner to the subject matter of any products liability litigation, whether already filed or filed in the future, which the Defendant received, had knowledge of or was entrusted with during his employment with AMC Jeep.

"2. From testifying either upon deposition or at trial, as an expert witness, or as a witness of any kind, and from consulting with attorneys or their agents in any products liability litigation already filed or to be filed in the future, involving Plaintiffs without Plaintiff's consent or order of this Court."

AMC appeals the reversal of the trial court's judgment issuing a permanent injection. Huffstutler cross-appeals the affirmance of the summary judgement.

The cause is now before this court pursuant to the allowance of a motion and cross-motion to certify the record.

Rayle & Stearns and Max E. Rayle; Crabbe, Brown, Jones, Potts & Schmidt, Charles E. Brown and Steven B. Ayers; Mayer, Brown & Platt, Richard A. Salomon, Howard J. Roin, Javier H. Rubinstein and Ira J. Belcove; Yates, McLamb & Weyher and Joseph W. Yates III, for appellants and cross-appellees.

Crandall, Pheils & Wisniewski, David R. Pheils and Dale R. Crandall, for appellee and cross-appellant.

King & Spalding, Chilton Davis Varner and Sean R. Smith, urging reversal for amicus curiae, Product Liability Advisory Council, Inc.

Porter, Wright, Morris & Arthur and Thomas R. Sant; Nancy A. Nord; Bickel & Brewer, Robert P. Cummins and Donald K.S. Petersen, urging reversal for *amicus curiae,* American Corporate Counsel Association.

John J. Curtin, Jr., Michael E. Tigar, Jerold S. Solovy and Barry Levenstam, urging reversal for *amicus curiae,* American Bar Association.

* * *

MILLIGAN, J. Our attention in this case is focused primarily upon the propriety of the permanent injunction issued by the trial court. For the following reasons, we reverse the judgment of the court of appeals and reinstate the permanent injunction.

Principles of attorney-client privilege are fully applicable here. Huffstutler was, at minimum, an agent acting on behalf of legal counsel to AMC. As such, Huffstutler is subject to all the legal implications of the attorney-client and attorney work product privileges. *Conforti & Eisele, Inc. v. Div. of Bldg. & Constr.* (1979), 170 N.J.Super. 64, 405 A.2d 487; see, also, *United States v. Kovel* (C.A. 2, 1961), 296 F.2d 918.

"* * * The only practical way to assure that * * * [confidential information is not disclosed] and to preserve public trust in the scrupulous administration of justice is to subject these 'agents' of lawyers to the same disability lawyers have when they leave legal employment with confidential information." *Williams v. Trans World Airlines, Inc.* (W.D.Mo. 1984), 588 F.Supp. 1037, 1044.

The attorney-client privilege may be asserted by the client or former client. *General Elec. Co. v. Valeron Corp.* (C.A. 6, 1979), 608 F.2d 265, certiorari denied (1980), 445 U.S. 930, 100 S.Ct. 1318, 63 L.Ed.2d 763. See, also, *Williams v. Tans World Airlines, supra* (where a law firm was disqualified prior to trial because it consulted with a nonlawyer who had previously assisted counsel for the opposing party).

Huffstutler claims the permanent injunction violates his constitutionally protected right of free speech under the First Amendment to the United States Constitution and Section 11, Article I of the Ohio Constitution.

Disclosure of confidential information does not qualify for protection against prior restraint under the First Amendment. *Seattle Times Co. v. Rhinehart* (1984), 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17; *Snepp v. United States* (1980), 444 U.S. 507, 100 S.Ct. 763, 62 L.Ed.2d 704. We have also held "[t]here is no constitutional bar to the issuance of an injunction against unlawful use of confidential business information." *Valco Cincinnati, Inc. v. N & D Machining Serv., Inc.*

(1986), 24 Ohio St.3d 41, 48, 24 OBR 83, 89, 492 N.E.2d 814, 820.

Further, as a *quid pro quo* for the privilege of being licensed to practice law, an attorney surrenders a fraction of the right of free speech guaranteed under the First Amendment.

" '* * * A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.

" 'Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.' " *Ohio State Bar Assn. v. Mayer* (1978), 54 Ohio St.2d 431, 438-439, 8 O.O.3d 434, 438, 377 N.E.2d 770, 774, quoting *In re Sawyer* (1959), 360 U.S. 622, 646-647, 79 S.ct. 1376, 1388, 3 L.Ed.2d 1473 (Stewart, J., concurring in the result).

It is the affirmative duty of an attorney to obey the Code of Professional Responsibility, which provides in pertinent part:

"* * *[A] lawyer shall not knowingly:

"(1) Reveal a confidence or secret of his client." DR 4-101(B)(1).

Therefore, an attorney has no right under the First Amendment to the United States Constitution or Section 11, Article I of the Ohio Constitution to disseminate information protected by the attorney-client privilege.

While conceding that some ethical and legal restraint is appropriate, Huffstutler argues that the injunction is overbroad and vague, thus impinging upon First Amendment rights to an unnecessary extent. We disagree. We have held that where confidential information is involved, an injunction "may, in order to do equity, be as broad as reasonably thought necessary" to avert the harm complained of. *Valco Cincinnati, Inc., supra*, 24 Ohio St.3d at 47-48, 24 OBR at 88, 492 N.E.2d at 819-820.

We also find the injunction sufficiently specific to put the enjoined party on notice of that which is prohibited.

Huffstutler also argues that the injunction would "gag" employees so as "to prevent possible discovery of alleged criminal and illegal conduct by Jeep relating to the production of the Jeep C.J. vehicle * * * and to conceal discoverable information from victims injured thereby who have named Jeep as a party defendant." We reject this "whistle blower" claim as it is simply unsupported by the record.

Next, Huffstutler argues that the court of appeals was correct in concluding that AMC had an adequate remedy at law. He argues that AMC can be protected on a case-by-case basis, if his testimony would violate attorney-client privilege or divulge trade secrets, in that each trial court could prohibit such testimony. In fact, at least five other state and federal courts have found a privilege to exist and denied Huffstutler's right to testify, issued protective orders prohibiting discovery of privileged materials, or otherwise acted to prevent the use of confidential information obtained from Huffstutler.[1]

The attorney-client privilege reaches far beyond a proscription against testimonial speech. The privilege protects against any dissemination of information obtained in the confidential relationship. Thus, allowing consultation and discussion (even without testifying) of privileged information would effectively emasculate the privilege. *Conforti & Eisele, Inc., supra.*

In order to protect the attorney-client and work product privilege, injunctive relief is appropriate, particularly where, as here, it is demonstrated that the former employee-attorney has already violated the privilege and threatens to continue such practice. *Id.*; see, also, *Valco Cincinnati, supra*; *Snepp, supra.*

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1 *Goldston v. American Motors Corp.* (N.C.Super. Apr. 21, 1989), No. 84 CVS 1327; *Jacobs v. American Motors Corp.* (W.D.Mo. Feb. 20, 1990), No. 89-0518-CV-W-5, 1989 WL 200920; *Hull v. Jeep Eagle Corp.* (D.S.C. Sep. 13, 1989), No. 3:89-161-16; *Matthews v. Jeep Eagle Corp.* (Fla.Dis.Ct. 1, Oct. 30, 1989), No. 88-6120-CA-01; *Perry v. Jeep Eagle Corp.* (S.D.Ind. Aug. 24, 1989), No. IP 88-685-C, 1989 WL 118750.

Finally, Huffstutler argues that the injunction would be virtually impossible to enforce, particularly outside the trial court's jurisdiction. We disagree. The Wood County Court of Common Pleas, having in personam continuing jurisdiction over Huffstutler, can continue to exercise supervisory authority over his compliance with the injunction. See *New York, Chicago & St. Louis RR. Co. v. Matzinger* (1940), 136 Ohio St. 271, 16 O.O. 375, 25 N.E.2d 349.

In his cross-appeal, Huffstutler claims that the trial court erred in entering summary judgment for AMC on his counterclaim alleging willful, malicious and illegal interference with contracts between Huffstutler and third parties. Because we conclude that the trial court did not err in determining the merit issues in favor of AMC and in granting a permanent injunction, there is no "business right" upon which Huffstutler could premise a claim for tortious injury or deprivation. *Donald G. Culp Co. v. Reliable Stores Corp.* (1983), 14 Ohio App.3d 161, 14 OBR 178, 470 N.E.2d 193; *Juhasz v. Quick Shops, Inc.* (1977), 55 Ohio App.2d 51, 9 O.O.3d 216, 379 N.E.2d 235.

The judgment of the Wood County Court of Appeals is affirmed in part and reversed in part, the permanent injunction issued by the common pleas court is reinstated, and the cause is remanded to said court for further proceedings according to law, including the exercise of continuing jurisdiction in connection with the permanent injunction.

Judgment accordingly.

MOYER, C.J., SWEENEY, HOLMES, DOUGLAS, WRIGHT and CACIOPPO, JJ., concur.

JOHN R. MILLIGAN, J., of the Fifth Appellate District, sitting for H. BROWN, J.

MARY CACIOPPO, J., of the Ninth Appellate District, sitting for RESNICK, J.